No. 14,496

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWIN B. SWOPE, Warden United States Penitentiary, Alcatraz, California,
Appellant,

vs.

SELVIE W. WELLS,
Appellee.

BRIEF FOR THE UNITED STATES.

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Subject Index

Table of Authorities Cited

Cases

Codes

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JURISDICTION.

This Court has jurisdiction of this appeal under the provisions of Sections 2253 and 2255 of Title 28, United States Code.

STATEMENT OF THE CASE.

On April 7, 1954 Selvie W. Wells petitioned for a Writ of Habeas Corpus (R. 3-6). On April 8, 1954 United States District Judge George B. Harris of the United States District Court for the Northern District of California issued an Order directing Edwin B.

Swope, Warden of the United States Penitentiary at Alcatraz Island, State of California, to show cause, if any, why a Writ of Habeas Corpus should not issue (R. 7). On April 29, 1954 Appellee, through his attorney, moved to dismiss the Petition for Writ of Habeas Corpus (R. 8-20). On June 4, 1954 Judge Harris in a Memorandum Opinion and Order concurred in by United States District Judge Louis E. Goodman ordered that a Writ of Habeas Corpus issue (R. 20-25). This as an appeal from the Writ of Habeas Corpus discharging Selvie W. Wells from the custody of Edwin B. Swope, Warden of the United States Penitentiary at Alcatraz, California, filed on June 9, 1954 by George B. Harris, United States District Judge for the Northern District of California (R. 26).

FACTS.

Appellee, after a plea of Guilty, was on March 5, 1938 in the Western District of Texas, sentenced to 20 years on the First Count of the Indictment, 25 years on the Second Count of the Indictment, to be consecutive to the First Count, 25 years on the Third Count of the Indictment, to be consecutive to the Second Count, and 20 years on the Fourth Count, to be consecutive to the Third Count (R. 9-12).

The First Count of the Indictment charged Appellee with taking money of an insured bank on March 5, 1938 by putting a certain Addie Walker in fear (R. 10). The Second Count of the Indictment charged

Appellee, at the time and place described in the First Count of the Indictment, with assaulting the said Addie Walker. The Third Count of the Indictment charged Appellee, at the time and place described in the First Count of the Indictment, with putting the life of the said Addie Walker in jeopardy by the use of a dangerous weapon (R. 10-11). The Fourth Count of the Indictment charged Appellee, at the time and place described in the First Count of the Indictment, with entering a bank with intent to commit a robbery (R. 11). On August 4, 1941 Appellee petitioned for correction of Judgment and Sentence to the United States District Court for the Western District of Texas (R. 17). On August 20, 1941 this motion was denied (R. 17). After appeal was taken from the denial of the motion, the Court of Appeals for the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgment of the Trial Court entered on April 13, 1938 (R. 17). The Court of Appeals ordered that Counts One and Two of the 1938 judgment be set aside (R. 18), but that Counts Three and Four remain in full force and effect.

Appellee then moved the United States District Court for the Northern District of California for a Writ of Habeas Corpus (R. 21). United States District Judge Louis E. Goodman dismissed this Petition on the grounds that Wells had failed to present the matter to the sentencing Court, as required by 28 U.S.C. 2255 (R. 22). The Petitioner then moved the United States District Court for the Western District of Texas for modification under that section.

The United States District Court denied this motion (R. 22). The Court of Appeals for the Fifth Circuit in the case of *Wells v. United States* reported at 210 F.2d 112, sustained the Trial Court (R. 22). It does not appear that Petitioner sought certiorari to the Supreme Court from this decision.

Petitioner then moved the United States District Court for the Northern District of California for a Writ of Habeas Corpus (R. 3-6).

Judge Harris granted a Writ of Habeas Corpus and in his Memorandum Opinion stated:

> "Petitioner has taken the procedural steps required by 28 U.S.C., Section 2255 at the behest of this Court. His petition for relief proved to be unavailing. This, despite the fact that the sentence he is now serving and which he challenged, is void. The decision of the sentencing court is manifestly erroneous. Stevenson v. Johnston, supra. Habeas corpus is the sole remedy remaining to petitioner for establishing his right to release."
>
> (R. 24-25.)

Appeal is taken to this Court from the Order, Judgment and Decree issuing a Writ of Habeas Corpus of Judge Harris.

QUESTIONS.

1. Did the District Court have jurisdiction to issue a Writ of Habeas Corpus after a Motion under Section 2255 of Title 28 U.S.C.A. was denied by the sentencing Court?

2. Can there be consecutive sentences for "entering a bank with intent to commit bank robbery and putting in jeopardy the life of a person by the use of a dangerous weapon?

ARGUMENT.

The District Court had no jurisdiction.

Section 2255 provides in part as follows:

> "An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the Court which sentenced him, or that such Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

In this case appellee applied for relief under Section 2255 and this relief was denied by the Court which sentenced him (R. 22). This decision was appealed to the Court of Appeals for the Fifth Circuit. That Court of Appeals in an Opinion reported at 210 F.2d 112, sustained the decision of the sentencing Court (R. 22).

Wells did not seek certiorari. The Court of Appeals for the Fifth Circuit stated at page 112 that "The appellant raises the question as to whether the sentence on Count Four is void for the reason that it constitutes a conviction for the same offense as described in Count Three." The Court of Appeals for the Fifth

Circuit also observed that the Motion before them was the fourth motion filed by appellee to vacate the judgment and sentence. The Court further observed that in *Wells v. United States,* 124 F.2d 334 the Court had upheld the sentence imposed on the Fourth Count as a "separate and distinct offense."

In *Hayman v. Swope,* 342 U.S. 205 at pp. 212-219, the Supreme Court reviewed the legislative and judicial history of Section 2255 of Title 28 U.S.C.A. The Supreme Court referred particularly to the problems created by repetitious petitions for habeas corpus. The Court observed that in 1943, 1944 and 1945, 40 percent of the petitions for habeas corpus were so-called "repeaters." Since Alcatraz Penitentiary is in the Northern District of California, the Court of Appeals for the Ninth Circuit has had considerable experience with the habeas corpus problem. Clearly, one of the reasons for the enactment of Section 2255 was to minimize the waste of judicial time caused by the relitigation of cases which have heretofore received exhaustive judicial attention.

This Court of Appeals has decided the question whether a Federal prisoner may seek a writ of habeas corpus after an application for Section 2255 relief has been denied on the merits. In *D. E. Normand v. Swope* (9th Cir.) 207 F.2d 66, *Jones v. Squire* (9th Cir.) 195 F.2d 179, *Winhoven v. Swope* (9th Cir.) 195 F.2d 181, this Court has held that where relief is denied on a Section 2255 Motion, a District Court is without jurisdiction to entertain a Federal prisoner's

application for a writ of habeas corpus. The Court of Appeals for the Tenth Circuit has also held that one may not resort to habeas corpus after exhausting his remedies under Section 2255.

Whiting v. Hunter, 204 F.2d 471;
Mills v. Hunter, 204 F.2d 468;
Barrett v. Hunter, 180 F.2d 510, 20 A.L.R. 2d 965.

Judge Harris apparently has concluded that if in the circumstances of this case habeas corpus is not available then Wells has been deprived of procedural due process of law. Judge Harris comes to this conclusion because, in his opinion, "The decision of the sentencing court is manifestly erroneous." (R. 25).

The Court of Appeals for the Tenth Circuit in *Barrett v. Hunter,* 180 F.2d 510 concluded that there was no constitutional problem in the finality of a Sec. 2255 motion. This Court in the decisions above cited holds that Congress has deprived the District Court of jurisdiction. In brief, Judge Harris is granted a writ of habeas corpus because he disagreed with the decision of the Court of Appeals for the Fifth Circuit. We submit that a disagreement with a Circuit Court's Opinion does not create "extreme circumstances". Furthermore, the denial by one Court of a Motion under Section 2255 does not make that remedy inadequate or ineffective. Such a result would by-pass the intention of Congress to make the Motion to Vacate conclusive except in those exceptional cases where the remedy is inadequate or ineffective. *Barrett v. Hunter,* supra.

If the opportunity to recontest the issues litigated under a Motion to Vacate is given every time there is a possibility for disagreement between the place of confinement and the place of conviction, the purpose of Section 2255 will be defeated. The reasonable solution to the very serious problem of repetitious petitions for habeas corpus will be subverted. The supposedly final determination of Section 2255 will be merely another stopping place on the judicial merry-go-round.

We respectfully submit that under the statute and under the decisions of the Court of Appeals for the Ninth Circuit and other Courts of the Federal Judicial System, the District Court was without jurisdiction to entertain the writ of habeas corpus.

A CONVICTION OF AGGRAVATED BANK ROBBERY DOES NOT MERGE WITH A CONVICTION OF ENTERING THE SAME BANK WITH INTENT TO COMMIT BANK ROBBERY.

Appellee was convicted in the Third Count of the Indictment of the "offense of having . . . committed the offense described in the First Count of the Indictment . . . (and) put the life of Addie Walker in jeopardy by the use of a dangerous weapon, to-wit, a pistol, . . ." (R. 10-11). The First Count of the Indictment charged Wells with robbing the Citizens State Bank, Luling, Texas, on March 5, 1938 (R. 10). Wells was convicted on the Fourth Count of the Indictment of the "offense of having, . . . entered the bank described in the First Count of the Indictment,

. . . with the intent to commit therein a felony, to-wit, robbery, . . .'' (R. 11).

Wells was actually convicted of the aggravated robbery of a bank in the Third Count of the Indictment. In the Fourth Count he was convicted of entering a bank with intent to commit a felony. Count Three charges a violation of the first paragraph of Section 2113(a) and Section 2113(d) of Title 18.[1] The Fourth Count of the Indictment charges a violation of the second paragraph of Section 2113(a).[2] It was Judge Harris's opinion that the conviction on Count Four necessarily merged with the conviction of aggravated bank robbery in Count Three.

It should be noted that Count Three does not charge putting in jeopardy the life of a person while *entering a bank with intent to commit a felony.* It charges putting in jeopardy the life of a person *while robbing a bank.* Count Three charges an aggravated form of the first paragraph of Section 2113(a). Count Four,

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[1](a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

[2]Whoever enters or attempts to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony affecting such bank and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

however, charges a violation of the second paragraph of Section 2113(a). A conviction of Section 2113(a) and a conviction of 2113(d) will merge if the Section 2113(d) conviction is the aggravated form of the former. However, the aggravated offense charged in Count Three is not that of *entering a bank,* but is that of the charge of *robbing a bank.* A conviction of the violation of the first and second paragraphs of Section 2113(a) does not merge because they are different offenses.

Rawls v. U. S., 162 F.2d 798;
Audett v. U. S., 132 F.2d 528.

In the *Rawls* case the Court of Appeals for the Tenth Circuit said: "The test to be applied to determine whether there are two offenses is whether each requires proof of a fact that the other does not." In a situation where the entry of a bank with intent to commit a felony and the robbing of a bank arose out of the same transaction, the Court held that the evidence necessary to prove an illegal entry was different from that for taking and carrying away property and therefore the two crimes did not merge, so as to preclude consecutive sentences. The Court of Appeals for the Fifth Circuit has held in the case of *Wells v. U. S.,* 124 F.2d 334, which involved the very same defendant as here; concerning the very same facts, that the conviction for *entering* a bank with intent to rob and for aggravated *bank robbery* did not merge. A conviction of Section 2113(e) does not merge with a conviction of aggravated bank robbery. *Clark v. U. S.,* 184 F.2d 952. See also *Ward v. U. S.,* 183 F.2d 270.

The mere fact that a conviction of two crimes arises out of the same transaction does not necessarily mean that the convictions merge. This Court held in *Crapo v. Johnston* (9 Cir.) 144 F.2d 863 that a conviction for possession of an unregistered firearm did not merge with the interstate transportation of that firearm. In *Arzaga v. U. S.* (9 Cir.) 189 F.2d 256 the Court held that a conviction for concealment of opium did not merge with a conviction of importation of that same opium. Neither does the crime of stealing mail bags merge with the crime of taking mail from those same bags. *Hoffenbarger v. Alderhold,* 67 F.2d 250. Nor does keeping an altered security with intent to pay the same, and passing that same security. *McMurty v. U. S.,* 139 F.2d 482. Obstructing justice is a separate crime from bribing a juror, even though the obstruction of justice was by the bribing of that same juror. *Slade v. U. S.,* 85 F.2d 686. The Supreme Court in *Morgan v. Devine,* 237 U.S. 632 held that burglarously entering with intent to steal does not merge with the crime of stealing stamps once the entry is made. In *Albrecht v. U. S.,* 273 U.S. 1, the Court held that a conviction of selling contraband liquor did not merge with a conviction of possessing that liquor for the reason that one may sell liquor without passing the same.

In *Blockburger v. U. S.,* 284 U.S. 299, in a case where the contention was made that the selling of narcotics out of the original stamped package merged with the selling of those narcotics without a written order, the Court gave as the test of whether or not there are two offenses in a single transaction as

whether or not each requires proof of an additional fact which the other does not.

> "The applicable rule is that here the same account or transaction constituted a violation of two distinct statutory provisions, the test to be applied to determine whether there were two offenses or only one is whether each provision requires proof of a fact which the other does not."
>
> *Blockburger v. U. S.,* supra.

Applying this test to the case at bar, the question is whether or not a person could rob a bank without entering it, and conversely, whether a person could enter a bank with intent to commit a felony and not rob it. It is obvious that entering a bank with intent to commit a felony need not result in the robbery of that bank.

Whether or not a person could rob a bank without entering it is a question presenting somewhat more difficulty. However, it is clear that a person could rob a bank by standing outside the door and threatening the employees inside. He would not have entered and yet would have robbed. A person could threaten the employees of a bank by mail or by telephone at a place far removed from the bank property itself, and still rob. Another situation might be where the robber realizes his intent to rob after his entry. In other words, he does not make up his mind until after he is in the building to take or carry away the funds of a bank.

The fact which is required to be proved in the crime of entering a bank with intent to commit a felony, which the crime of aggravated bank robbery does not,

is entry. The fact which the crime of "aggravated bank robbery" requires, which the crime of "entering a bank with intent to commit a felony" does not, is robbery. Congress by listing these two crimes in separate paragraphs of Section 2113(a) evidenced an intent that these two acts which may or may not form part of the same transaction be punishable separately.

In the present case Judge Harris was obviously moved by the somewhat harsh sentence of the Texas Court. The assessing of consecutive 25 and 20-year sentences for a single transaction is somewhat severe. The choice of the punishment to be applied in this case, however, was that of the Court which tried the case.

The case of *Stevenson v. Johnson,* 72 F. Supp. 627, affirmed 163 F.2d 750, involved a situation where the defendant was convicted of robbing a bank and received also a consecutive sentence for "robbing a bank and putting in fear the life of a person." This case is readily distinguishable from the instant case in that the two crimes present here are entry of a bank with intent to commit a felony and aggravated bank robbery. In *Stevenson v. Johnson,* supra, one charge was merely the aggravated form of the other. That is to say, the aggravated form of the first paragraph of Section 2113(a), the case did not involve the first and second paragraphs of Section 2113(b).

It would be, of course, possible to charge in violation of Section 2113(d) the aggravated form of a violation of the second paragraph of Section 2113(a). However, this is not true here.

CONCLUSION.

Appellant respectfully submits that the District Court erred in deciding that entering a bank with intent to commit a felony and putting a person's life in jeopardy while robbing a bank was the same offense. Appellant further submits that even if the Court clearly interpreted the decisions of the Ninth Circuit in this regard, it had no jurisdiction in the instant case. Wells failed to appeal from the decision of the Court of Appeals for the Fifth Circuit in the proceeding, which under Section 2255 of Title 28 was the proper place to determine the validity of his sentence. Under the plain language of that statute and the decisions of this Court of Appeals and other Courts which have had the question, the District Court had no jurisdiction. The decision of the District Court discharging Wells from custody should be reversed and Wells ordered returned to the custody of the appellant.

Dated, San Francisco, California,
November 12, 1954.

Respectfully submitted,

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